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In the Supreme Court of the United States

OCTOBER TERM, 1968

JAMES MAHONEY, ET AL., PETITIONERS

v.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Under the National Housing Act, 12 U.S.C. 1724, *et seq.*, the Federal Savings and Loan Insurance Corporation ("FSLIC") provides insurance for "insured members" of insured financial institutions.[1] The in-

[1] 12 U.S.C. 1724(b) (Supp. II, 1965-66) defines "insured member" to mean, *inter alia*, "an individual, partnership, association, or corporation which holds an insured account." 12 U.S.C. 1724(c) defines "insured account" to mean "a share, certificate, or deposit account of a type approved by * * * [FSLIC] which is held by an insured member in an insured institution * * *."

surance payable to each "insured member" is limited by statute to a maximum aggregate amount (at the time in question, $10,000),[2] even if the member owns two or more accounts. 12 U.S.C. 1728(a).

In 1965, state authorities appointed a receiver for liquidation of the Marshall Savings and Loan Association ("Marshall"), an Illinois-chartered institution insured by FSLIC under the National Housing Act. In passing upon the resulting claims for insurance, FSLIC determined that $90,206.55 of the $270,206.55 on deposit in some 46 joint accounts in Marshall, was uninsured because the members' accounts exceeded the $10,000 statutory limitation (App. 17; Pet. 5).[3] Petitioners, who held several accounts in Marshall, brought the present class action in the United States District Court for the Northern District of Illinois, to challenge this determination (App. 1-11).

FSLIC's reasoning as to petitioners' three accounts is applicable to all 46 joint accounts at issue here.[4]

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[2] Pursuant to an amendment in 1966, effective as to defaults occurring after October 16, 1966 (80 Stat. 1055), the statutory maximum has been raised to $15,000 per insured member. 12 U.S.C. 1728 (Supp. II, 1965-66).

[3] "App." refers to the Appendix to the Brief for Defendant-Appellant in the court of appeals, a copy of which has been lodged with this Court.

[4] The joint accounts involved in this class action represent only a small fraction of the joint accounts in Marshall, most of which were fully insured by FSLIC (see App. 33). To the extent that their accounts were not fully covered, all depositors, including the plaintiff class, received certificates entitling them to participate in the liquidation of Marshall up to the full amount of their uninsured deposits (Reply Brief for Defendant-Appellant in the court of appeals, p. 3).

The signature-card contract creating each of petitioners' accounts was stamped with the legend "As Joint Tenants with the right of survivorship and not as tenants in common" (Pet. App. 3a-4a, 6a-7a).[5] Each contract stated that the documents representing ownership of the account would be issued to "the undersigned" (*ibid.*). Since each of the contracts was signed solely by petitioners James and June Mahoney (Pet. App. 3a-6a), FSLIC reasoned that they were the sole owners, as joint tenants, of the three accounts, notwithstanding that two of the signature cards each also bore the typed name of one of their children. Since neither of the Mahoney children signed the agreements (Pet. App. 3a-6a), and since under Illinois law a valid joint tenancy is created only as to individuals who sign the written contract creating the account,[6] FSLIC concluded that the typing of the additional names on the agreements did not affect the legal ownership of the accounts (App. 12, 18).[7] Thus, FSLIC determined, there was but a single "insured

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[5] As the court of appeals noted (Pet. App. 7a), the use of the tenancy in common form in connection with one of the Mahoney accounts is irrelevant.

[6] Section 4-10(a) of the Illinois Savings and Loan Act, 32 Ill. Rev. Stat. Ann. § 770(a); Section 2(c) of the Illinois Joint Rights and Obligations Act, 76 Ill. Rev. Stat. Ann. § 2(c). See *Frey* v. *Wubbena*, 26 Ill. 2d 62 (1962).

[7] In addition to the joint accounts involved here, the Mahoneys maintained three revocable trust accounts in Marshall. FSLIC paid the $30,000 insurance on these accounts after determining that such accounts constituted valid trusts under Illinois law (Reply Brief for Defendant-Appellant in the court of appeals, p. 7, n. 3).

member"—*i.e.*, the joint tenancy consisting of James and June Mahoney—to whose accounts the $10,000 statutory limitation applied, so that deposits in excess of that aggregate figure were uninsured (App. 12, 17).[8]

Petitioner contended in the courts below that, for insurance purposes, FSLIC should have recognized that the accounts constituted three separate "insured members," on the ground that failure to comply with the signature requirements of Illinois law was irrelevant under federal law (App. 1-6).[9] The district court denied FSLIC's motion for summary judgment, and entered findings of fact and conclusions of law imposing liability on FSLIC (App. 17-27). The court of appeals unanimously reversed, holding that FSLIC was entitled to judgment as a matter of law (393 F.2d 156; Pet. App. 1a-10a).

The decision of the court of appeals is correct, is not in conflict with any other decision, and is, in light of recent regulations, of little prospective significance.

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[8] Although the definition of "insured member" in 12 U.S.C. 1724(b) does not expressly provide for joint tenancies (see n. 1, *supra*), 12 C.F.R. 561.3 (1963 ed.) stated that "An insured account held jointly is insured in the same manner as an insured account held by a partnership, up to but not exceeding $10,000 jointly to the holders thereof."

[9] Petitioners concede that FSLIC's reading of Illinois law (which they disputed below) is not "appropriate for review" by this Court (Pet. 2, n. 1). It is unclear whether petitioners are presently relying on the estoppel theory which they also urged below (App. 6-8; Pet. App. 8a-10a, 16a). See note 13, *infra*, p. 6.

1. Contrary to petitioners' assertions (*e.g.*, Pet. 7-8), the court of appeals did not hold that state law determines the scope and amount of FSLIC insurance under the National Housing Act. The court of appeals simply held that controlling federal law looks to state law as delineating the identity of an entity (such as a joint tenancy) claiming membership in the insured financial institution (Pet. App. 3a). It is only that threshhold question which is involved, and only that issue which was held to turn on state law.

The court's ruling is correct. Many of the financial institutions which are insured under the National Housing Act (*e.g.*, state-chartered savings and loan associations such as Marshall) were in existence long before the establishment of FSLIC in 1934. As the provisions of the Act demonstrate,[10] the FSLIC insurance program was superimposed upon, and presupposed the existence of, a body of state law governing the relationship between the financial institutions and their members.[11] Moreover, Congress itself

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[10] Thus, while 12 U.S.C. 1724(b) provides that an "insured member" may be one of a variety of legal entities (*e.g.*, partnerships, corporations, trusts, community property accounts of husbands and wives), the Act does not define the legal requirements for establishing any of the listed legal entities.

[11] Federal statutes often incorporate provisions of state law—particularly where, as here, the subject concerns concepts of property which are deeply rooted in state law. See, *e.g.*, *Reconstruction Finance Corp.* v. *Beaver County*, 328 U.S. 204, 210; *United States* v. *Loan & Bldg. Co.*, 278 U.S. 55; *De Sylva* v. *Ballentine*, 351 U.S. 570, 580. In particular, the courts have consistently looked to state law for the initial determination of whether there has been created an insurable legal entity which is entitled to insurance coverage by a com-

has acted on this very premise. Thus, in 1959, Congress amended the section of the National Housing Act here involved, 12 U.S.C. 1724(b), to provide a special definition for "insured member," in order to override the impact of the "community property" approach followed in several states.[12]

2. Contrary to petitioners' contention (*e.g.*, Pet. 19), the ruling of the court of appeals is supported by the long-standing administrative construction of the Act.[13] The March 1937 issue of the Federal Home

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parable agency, the Federal Deposit Insurance Corporation. See *Phair* v. *FDIC*, 74 F. Supp. 693 (D. N.J.); *Connor* v. *FDIC*, 112 Vt. 380, 26 A. 2d 105; *FDIC* v. *Casady*, 196 F. 2d 784 (C.A. 10); *Billings County* v. *FDIC*, 71 F. Supp. 696 (D. N.D.), modified on other grounds, 168 F. 2d 452 (C.A. 8).

[12] 73 Stat. 262. See S. Rep. No. 491, 86th Cong., 1st Sess., pp. 1-2 (1959).

[13] In both courts below, this argument was understood to turn on principles of estoppel (see Pet. App. 8a-9a; 16a). In this Court, petitioners seem to disclaim (Pet. 23) any present reliance on the estoppel theory which they urged below (App. 6-8). In any event, as the court of appeals held, that theory is of no avail. FSLIC can not be estopped because Marshall and other savings and loan associations may have misled depositors by statements as to the insurability of accounts which were inconsistent with the $10,000 statutory limitation. Moreover, the record shows that, after learning of such misstatements, FSLIC acted, within the limitations of its statutory authority, to prevent further publication of misleading information (App. 13). Nor can FSLIC be estopped because its audits did not disclose petitioners' noncompliance with Illinois law. FSLIC conducts audits for the primary purpose of determining the financial condition of insured institutions, and not for the purpose of determining the insurability of accounts (App. 34-35). Indeed, it would be impossible for FSLIC to examine each account to determine its insured

Loan Bank Review, published by the Federal Home Loan Bank Board (the operating head of FSLIC), stated (p. 187) that "the status of ownership of an insured account is determined in accordance with the investment contract and the law of the State in which the contract is made * * *"; and that "Ownership, as so determined, will control the settlement of insurance * * *." [14] This early administrative construction has been consistently followed by the Board (see App. 54-70), and has been recognized by the savings and loan industry.[15]

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status. On September 30, 1966, FSLIC insured 4,513 institutions with some 40,000,000 accounts, and on April 8, 1965, Marshall alone had 27,197 members with about 17,000 joint accounts (App. 32-33).

[14] Petitioners' reliance (Pet. 16) upon FSLIC's approval of the signature card forms used by Marshall is misplaced. As the court of appeals noted (Pet. App. 9a), the legend on the cards, "One Signature required," merely restated the provision of the contract that the "signature of any of the undersigned" is sufficient for withdrawal.

12 C.F.R. 561.3 (1963 ed.) (see n. 8, *supra*, p. 4) merely confirms that joint accounts, like partnerships, are entities insurable under the Act independently of the individuals who form them. Contrary to petitioners' assertion (Pet. 15), FSLIC did not concede below that a partnership is validly established, as a matter of *federal* law, by the signature of a single partner; it merely recognized that most *state* laws do not require the signatures of all partners (Brief for Defendant-Appellant in the court of appeals, p. 11; Reply Brief for Defendant-Appellant in the court of appeals, p. 8).

[15] The *United States League Federal Guide* (May 1968) published by the United States Savings and Loan League as a standard reference service for the industry, states (¶ L 9-45.1):

> To be insured by the FSLIC as a joint savings account, the account must qualify as a joint tenancy account under the state law.

3. Recent regulations adopted by the Federal Home Loan Bank Board, effective September 1, 1967, reaffirm that FSLIC insurance extends only to accounts held under forms of joint ownership "valid under State law * * *." 12 C.F.R. Part 564, Appendix F (1968 ed.).[16] The new regulations now add, however, an independent federal requisite that will eliminate for the future the type of question raised by petitioners, for it is now uniformly specified that a "joint account shall be deemed to exist, for purposes of insurance of accounts, only if each co-owner has personally executed an account signature card and possesses withdrawal rights." 12 C.F.R. 564.9(b) (1968 ed.). These regulations, adopted pursuant to a 1966 amendment to the Act,[17] render the issues raised by the petition devoid of prospective significance.

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[16] Congress provided in 1966 that suits to which FSLIC is a party "shall be deemed to arise under the laws of the United States * * *" (80 Stat. 1042). Contrary to petitioners' contention that this signaled the applicability of federal substantive law to all issues in FSLIC litigation (Pet. 10), this provision was merely added to confirm FSLIC's right to remove actions from state courts without regard to the amount in controversy. S. Rep. No. 1482, 89th Cong., 2d Sess., p. 19 (1966).

[17] The amendment was designed to enable FSLIC to "bar the use of devices such as numerous joint accounts in various combinations * * * to obtain insurance far in excess of the limits established by Congress." 112 Cong. Rec. 26472 (October 13, 1966). It authorized FSLIC to define the statutory terms used in 12 U.S.C. 1724(b) and (c) and to prescribe "the extent of the insurance coverage * * *" (80 Stat. 1056).

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

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